No. 21168

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOGAN LANES, INC., an Idaho Corporation,
Appellant,

vs.

BRUNSWICK CORPORATION, a Delaware Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF OF APPELLANT

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STATEMENT OF PLEADINGS AND JURISDICTION

This action was commenced in the United States District Court for the District of Idaho, Eastern Division, January 21, 1966, by filing the complaint and having summons issued (R 4-13). The summons was handed to the United States Marshal January 24, 1966, and that date he served a copy of complaint on the appellee (R 14) and the cause received its docket number 4-66-5. Subsequent

thereto on February 8, 1966 (R 20 and R 31), sixty four interrogatories (R 15-19) and formal requests for admissions with attached exhibits (R 21-35) were each served on the appellee. On February 14, 1966, the appellee appeared and filed a motion supported by stipulation (R 32) on which the court entered formal Order February 15, 1966 (R 33). March 7, 1966, the appellee appeared through filing a Motion to Dismiss (R 34) and on the same date and without supporting brief, the appellee filed a Motion for Extension of Time (R 36-37). Appellant served and filed on March 25, 1966, Motion for Order Compelling Defendant to Answer Interrogatories (R 38-39) with supporting Brief in support of the motion (R 40-42). Thereafter on April 13, 1966, the appellant filed and served an Amended Complaint (R 43-52); and on April 21, 1966, the appellee filed a Motion to Dismiss the amended complaint (R 53).

Jurisdiction in the original action was maintained (Amended Complaint R 43-45, 47) and the proceedings were commenced (Complaint R 4-5, 7) against the defendant under Sections 15 and 13 of Title 15, United States Code, being part of the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against the Lawful Restraint of Monopoly", as amended, commonly known as the Sherman Act and the Clayton Act and the Robinson-Patman Act, and in particular that Act of October 15, 1914, c 323, Section 2, 38 Stat 730; June 19, 1936, c 592, Sec. 1, 49 Stat 1526; and this is a suit authorized by the Act of October 15, 1914, c 323, Sec. 4, 38 Stat 731, referred to also as 15 USC, Sec. 15.

The jurisdiction of the District Court was and is invoked pursuant to the above and this being a civil action over which said district court had original jurisdiction pursuant to the act of June 25, 1948, c 646, 62 Stat 931, cited also 28 USC 1337. (Although, jurisdiction might well lie also by virtue of 78 Stat 445, cited also as 28 USC. Sec. 1332.) After hearing in open court on May 20, 1966, the court denied the motion of plaintiff to compel defendant to answer interrogatories and granted defendant's motion for extension of time to answer plaintiff's interrogatories "allowing 10 days after the ruling on defendant's motion to dismiss, for defendant to answer" (R 65). On June 6, 1966, the District Court entered final Judgment in favor of the appellee and against appellant in nature of granting a Summary Judgment (R 104). On June 16, 1966, appellant filed and served on appellee a Notice of Appeal (R 105-106) and Bond for Costs on Appeal (R 107-108) and on June 17, 1966, filed its Designation of Contents of Record on Appeal (R 109-111) and has filed with this court a Designation of the Record and Appellant's Statement of Points (R 114-115).

The jurisdiction of this United States Court of Appeals for the Ninth Circuit is invoked under 28 USC, Secs. 1291 and 1294, that is the following statutes: 62 Stat 929; 65 Stat 726; 72 Stat 348; 62 Stat 930; 65 Stat 727; 72 Stat 348; 73 Stat 10; 75 Stat 417.

STATEMENT OF THE CASE

Questions Involved

Substantive and procedural questions are involved on this appeal.

First, we present the procedural questions in the case by a succinct analysis. After ten days from the commencement of the action pursuant to Rule 33 of the Federal Rules of Civil Procedure, the appellant on February 8, 1966 (R 20) served Interrogatories (R 15-20) and on that same date (R 31) pursuant to Rule 36, Federal Rules of Civil Procedure, served appellee with Requests for Admissions. Such requests contained attached exhibits (R 26-30) requesting genuineness and authenticity. Appellee being compelled to answer within twenty days after the service of the summons and complaint upon it or to answer prior to February 15, 1966, pursuant to Rule 12, FRCP, and having ten days to serve written objections or fifteen days to answer the interrogatories pursuant to Rule 33, FRCP. and ten days to deny the admissions requested without same being deemed admitted pursuant to Rule 36, FRCP, and the time periods on interrogatories and requests running from February 8, 1966, when each of these were served, did state to the court a desire for additional time in which to plead to the complaint and in which to answer or object to interrogatories and to deny or respond to requests for admissions, moving the court to extend the time to March 7, 1966, "within which to plead to or answer the said complaint and extend the time in which to object to or answer the said Interrogatories and the time in which to deny or respond to the Requests for

Admissions, up to and including Monday, March 7, 1966, . . ."; and the appellant through its attorney, stipulated that it did not object to such additional time "if such Complaint and Interrogatories and Requests for Admissions be pleaded to, answered or responded to or as appropriate denied on or before March 7, 1966" (R 32), the court then ordered that the appellee, the defendant below, be granted such extension of time and "the Defendant is hereby ordered to answer or otherwise plead to the said complaint and object to or answer the interrogatories hereinbefore served and respond to or deny the several requests for admissions hereinbefore posed on or before March 7, 1966." (R 33).

On the last day and date so allowable the appellee responded to the complaint by filing a Motion to Dismiss (R 34). On this same last day, the appellee filed a Motion for Extension of Time (R 36) and served same that date by mail (R 37). The appellee in filing this latter motion did not file a brief containing a written statement of reasons in support thereof or a memorandum of the points and authorities relied upon by it as so provided by rule of the district court (R 35) being Rule 7 of the United States District Court for the District of Idaho, effective March 7. This rule provides that failure by the moving party to file any instrument or memorandum of points and authorities so provided shall be deemed a waiver by the moving party of such motion (R 35—last paragraph).

Ten days having passed after March 7, 1965, in which to object to the Interrogatories and fifteen days having passed and defendant not having answered said interrog-

atories and not having filed any denial to the requests for admissions, the plaintiff then served and filed March 24, 1966, its motion for order compelling defendant to answer the interrogatories (R 38-39).

The appellant by the failure of appellee to deny the admissions asserted and maintained the same should be deemed admitted as provided by rule, and pursuant to the federal rules of civil procedure filed a motion for order compelling appellee to answer the interrogatories (R 38-39), and served and filed brief in support of its Motion to Compel answers to Interrogatories (R 40-42). On April 13, 1966, as allowed by Rule 15, FRCP, the plaintiff filed and served amended complaint (R 43-52). Thereafter the defendant served and filed a Motion to Dismiss the amended complaint (R 53). The procedural questions presented are whether the requests should be deemed admitted, whether the court erred in denying the motion of plaintiff to compel the defendant to answer interrogatories and whether the court erred in granting the motion of the defendant for extension of time and whether the defendant should now be compelled to answer fully each interrogatory having waived objection thereto, and whether the trial court erred in not either ignoring or ordering stricken such motion for extension of time. Further the question is involved whether the trial court prematurely frustrated discovery efforts which appellant asserts were legitimately open to it to explore and develop the facts on public use of competing facilities and other background facts and discover the relevant facts to develop the evidence on which the alleged harm has sprung. The further question involved is whether a trial court has a right to so extinguish

all preliminary discovery efforts, as well as the question of the right asserted by appellant in a party to have all the facts determine the legal consequences, and after refusing preliminary discovery may a court grant judgment against such party denied the benefit to develop the relevant background facts.

The questions involved in granting the Motion to Dismiss directed to the Amended Complaint were raised by the filing of the Appeal to the Judgment (R 105-106).

The substantive questions arise from applying the Robinson-Patman amendments of the Clayton Act to the facts set out in the amended complaint (R 43-52). These questions arose when the court granted the Motion to Dismiss by treating it as a Motion for Summary Judgment which brought into consideration the facts found in the amended complaint, treating such facts therein alleged as true. The facts are found by considering the allegations in the record on pages 43-52. In summary such facts are that Brunswick Corporation, appellee herein, organized and existing under the laws of Delaware, operating a manufacturing plant in Michigan, with its main offices in Chicago, Illinois (Par 4, R 44), is in the business of manufacturing, selling and distributing in interstate commerce, bowling equipment and lanes and property incident to bowling activity and billiard and snooker tables and other machinery and equipment incidental to bowling and billiard operations to customers in the several states of the United States, in the course of which business there is a constant and continuous stream of trade and commerce between the states and the activities of the appellee are

within and directly affect commerce among the several states (R 43-44).

In 1959 appellant, organized as an Idaho corporation (Par 3, R 44), started in business and like other dealers and businesses so situated purchased from appellee equipment, lanes, automatic pin setters and property for the purpose of setting up bowling alleys and charging the public an amount for bowling (Par 6, R 45). From that time and continuously after the appellant remained and is a customer of appellee, ordering from yearly or periodic catalog or price lists supplied it by appellee, and being solicited by appellee at intervals. The appellant makes most of its purchases from appellee. The appellant buys from appellee and appellee sells to appellant commodities in a rather continual and continuous course of dealing (R 46). The cash price for the sixteen lanes and pinsetters was $212,005.63 (Par 13, R 48)

The lanes and pinsetters and equipment of the appellant have been well maintained and modernized and through a contract with appellee of July 18, 1963, specific modernization was undertaken (Par 14, R 50), wherein other major commodities were sold to appellant at a cash price of $29,723.24, a higher price than its competition to the extent of the discriminatory percentage (Par 13, R 48-49).

At the time appellant commenced business and since competitors of appellant serve the same competitive area and solicit customers from the same population area and compete for the same customers and among these competitors is a business located in a student union building in

the same county, which particular competitor has always been openly competitive to appellant (Par 10, R 46).

The appellant with other operators of bowling lanes in the area comprising the states of Idaho and Utah have a common interest in maintaining free and unhampered markets for the purchase of bowling lanes, pinsetters, and equipment from manufacturers or distributors and the ability of the appellant and other such operators to maintain and conduct their trade or business is fully dependent upon their ability to purchase without favor or preferential pricing and price discrimination (Par 7, R 45).

Appellant operates an establishment for bowling and billiards known as Logan Lanes in Cache County, Utah, and has caused a large modern building on a large lot to be constructed and invested large amounts of money on equipment and large sums for promotion and advertising and maintains a modern building with large investment in bowling lanes, and related property with a staff to serve its customers and that this business is a competitive business in which the appellant has developed valuable good will and excellent reputation and a large profitable business among its customers, the bowling public in the area, and did enjoy a profitable business until the effect of the discrimination and but for the discriminatory acts it would have continued to enjoy a lucrative business and have increased its profits and prospered (R 45-46).

After the plaintiff started in business the appellee sold to this competitor of appellant commodities of like grade and quality for the use and benefit of such competitor and consumption in its business activities at a price lower than

it sells such commodities of same or like grade and quality to appellant, the price difference being in general sales approximately 17% to 25% lower to such competition than to Plaintiff (Par 13, R 47).

The appellee in one major sale discriminated against the appellant by selling to the Utah State Building Board commodities of like grade and quality for use and consumption in Cache County, Utah, on or about March or April, 1964, when it sold ten lanes and pinsetters for $81,118.56 or an approximate price of $8,111.86 per lane and the appellee at a lower and discriminating price sold and continues to sell snooker and billiard tables and other equipment to the said Utah State Building Board or others for use in competition with the appellant in Cache County, Utah (Par 13-9, R 49).

That the property and commodities so sold to the Utah State Building Board by Appellee were sold for the purpose and use in competition with the appellant and were to be and have since the fall of 1964 been used in competition with the appellant.

On the major sale there was an unlawful price discrimination practiced by the appellee against the appellant of $4,980.00 per lane or a total of $79,680.00 as applied to the sixteen lanes of appellant (Par 13, R 49). From at least October 5, 1960, and at all times since and at the present time the appellee continued and does continue up to the present time to discriminate against the appellant by selling to competition of appellant any and all bowling equipment and other commodities on the discount basis of from 17% to 25%.

That as a result of the unlawful discrimination in prices the appellant has been and is unable to successfully compete with the competitor lanes enjoying the lower prices as granted by appellee in Cache County, Utah, and appellant must charge a higher per line cost to each bowler than its competitor; and, the competitor due to the unlawful price discrimination has secured its lanes, pinsetters, and other equipment at a reduced price and as a result charges its customers, the bowling public in the area of Cache County, approximately 17% to just over 22% less than appellant though each provide the same facilities (Par 11, R 46-47). As an obvious and direct consequence of such discrimination practiced by appellee such competition of appellant would be expected to and does charge lower prices to customers than appellant can afford to charge or be expected to charge customers (Par 11, R 47).

After appellant originally acquired equipment and other commodities from appellee, the appellant has been allowed to and has purchased commodities from appellee but only at a higher price for such commodities than the appellee charges the competitor of appellant and the appellee did not make the same lower price available to appellant as it has made available for the use of such competition. The appellee reduced its prices for commodities used by the competitor of appellant while continuing to charge appellant a higher price on such commodities and without giving appellant an opportunity to purchase at the same lower price and appellee created a difference in prices for commodities of like grade and quality which prices were not available at the same time to all competing purchasers and which lower prices were not available to appellant

(Par 12, R 47). The actions of the appellee were so overt and callous in injuring the appellant in Cache County, Utah, that the appellee knew or should have known that such price discrimination and in such large percentage would not allow the appellant to compete in the area and would in fact inflict great damage on appellant and effectually force it from business because of the economic facts in the area and market covered by appellant and its competition (Par 12, R 47).

The tangible property of appellant so affected has a net cost cash value of $300,424.17 and would have a market value, without the price discount discrimination practiced by appellee of $200,282.78, and including good will the whole business value would be at least the sum of $250,282.78 (Par 14, R 50).

Because of and as a result of the price discrimination illegally practiced by appellee in violation of Title 15, Sec. 13, USC, the entire value of the going business and assets of the appellant, Logan Lanes, Inc., has been reduced to and is not now over $50,000.00 (Par 15, R 51). Because of the unlawful price discrimination appellant has been unable to pay certain required installments to appellee on a pinsetter contract and the appellee has instigated foreclosure procedures which is leading to additional expenses and damages and might well involve the entire loss of the to date investment of appellee of over $300,424.12 together with its very valuable good will built up at great cost and time by its officers (Par 16-17, R 51-52). Demand was made under date of November 12, 1965, to the appellee to place the appellant on equal price footing with the com-

petition complained of so that an equal chance to compete would exist, and the appellee refused to do so and started the foreclosure action on the pinsetter contract after such demand (Par 18, R 50).

The questions involved arise with the court giving Judgment to the appellee based on those grounds or reasons found in its memorandum entered over date of May 26, 1966 (R 98-103). More specifically, the lower court found the principal question (R 100) is whether a sale to a sovereign renders a seller immune from actions brought pursuant to 15 USC 13 (a). The district judge held that the seller was "immune" noting that several cases "appear to stand for the proposition that the Robinson-Patman Act does not apply to sales to a sovereign" (R 100). Assuming a sale to a state is subject to the provisions of the Robinson-Patman Act then the district court stated the opinion the fact questions as to the use, class and type of goods and definition of "supplies" in exemption provided in 15 USC 13 c should be answered that "the defendant would be entitled to the exemption afforded. . . ." (R 102).

Appellant takes the position that certainly there is no "immunity" involved unless the sovereign is attempted to be made a party and that no general exemption should be afforded appellee or this course of conduct under the law; and, further the statutory 15 USC 13 c exemption is inapplicable to the facts herein or the applicability cannot and should not be determined without all of the facts being before the court as to the public use of the facilities.

SPECIFICATION OF ERRORS

1. The trial court erred in entering a summary judgment in favor of appellee and against the appellant.

2. The trial court erred in considering the motion to dismiss as a motion for summary judgment.

3. The trial court erred in granting appellee's motion to dismiss whether treated as such motion or as motion for summary judgment.

4. The trial court erred in considering the question of 15 USC 13 c (52 Stat. 446) exemption of non-profit institutions either on motion to dismiss or on a motion for summary judgment as genuine questions of material fact exist and were raised.

5. The trial court erred, when considering the position of appellee on the said 15 USC 13 c exemption, to include in his function deciding an issue of fact as he should have determined only whether there is an issue of fact to be tried.

6. That the Amended Complaint states a cause of action under the antitrust laws of the United States and genuine issues of fact exist as to whether appellee is or is not entitled to the benefit of exemption as provided in Title 15, USCA, Sec 13 c, and that the trial court erred in holding the sales of appellee and the transactions sued upon immune from an action under the Robinson-Patman Act.

7. That the Judgment entered by the court is against the law governing the facts and the parties and abridges the right of appellant to trial, right to discovery and a right

to have all the facts weighed before legal consequences are determined.

8. That the trial court erred in granting appellee's motion for extension of time.

9. That the trial court erred in denying appellant's Motion for Order Compelling the appellee to answer Interrogatories.

10. That the trial court erred if it did not deem each admission requested by appellant as an admission made by appellee.

11. That the trial court erred in not ordering stricken or ignoring appellee's Motion for Extension of Time which motion was made after Stipulation and after Order entered of February 15, 1966.

12. That the trial court erred in prematurely frustrating discovery efforts of appellant.

ARGUMENT

Summary

The amended complaint in this cause states a claim for relief alleging facts showing a violation of 15 USC 13, the Robinson-Patman Act. Brunswick Corporation is not entitled to the benefit of any immunity enjoyed by the State of Utah. The federal antitrust legislation preempts the field and Congress intended to exercise the commerce power under the federal constitution to its full extent and in this intention included all activities within the United States in buying and selling commodities to be used competitively in a market area. There is no implied exemption in sales to the several states, and the common law rule that a sovereign authority impliedly intends not to be bound by its own legislation which tends to restrict or diminish its power, right or interest, unless expressly stated. refers to an exemption of the enacting sovereign and should not be extended to any other "sovereign". The genesis of the attorney general opinions on sovereign exemption is based upon a rule of construction affecting only the enacting sovereign and not other "sovereigns". No basis for applying non-profit institution exemption has been sufficiently laid in the facts before the court or a genuine issue on material facts exists precluding granting summary judgment. The district court should follow the federal rules of civil procedure as supplemented by local rules, and should not invent or allow the parties to assert wholly different procedures than those set by rule. The judgment below should be reversed.

The holding of the judge below as disclosed by the Memorandum Opinion (R 98-103) is essentially founded on two asserted exemptions; the first is asserted by citing three cases and distinguishing one case and the other is based on a statutory exemption. This brief covers each

of these points and for purposes of illustrating legislative intent first considers the statute and background law. Because of the reliance upon certain specific authorities in the Memorandum, we shall consider each of these in detail.

Preliminary Consideration of Statute

The Robinson-Patman Act amendment to the Clayton Act is an inclusive general policy statement being self-contained in both the prohibited acts, possible defenses and even as to evidentiary and procedural matters. The Act and the intent of the Act is to set out activities which are prohibited and listing specifically all possible defenses and the procedural handling in creating a *prima facie* case and establishing the defenses. It should be pointed out that while the plaintiff relies most heavily on 15 USC 13 (a) it is also bringing its action under all of Section 13 including 13 (c), 13 (d) and 13 (e) as the latter might bear on the acts complained of or at the least as important in clearly showing Congressional intent to rid the marketplace of all price discrimination. (f) is not relevant.

We set out 13 (a) and (b) in full and (c), (d) and (e) in skeletal form with our italics, as follows:

DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE: SELECTION OF CUSTOMERS

"(a) It shall be unlawful for *any person* engaged in commerce, in the course of such commerce, either directly or indirectly, to *discriminate in price* between *different purchasers* of *commodities* of like grade and quality, where either or any of the purchases involved

in such discrimination are in commerce, where such commodities are *sold for use,* consumption or resale *within* the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend or create a monopoly in any line of commerce, or to injure, destroy, or prevent *competition,* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantitites are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, that nothing herein contained shall prevent price changes from time to time wherein response to changing conditions

affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person . . . to pay or grant . . . any allowance or discount in lieu thereof [anything of value as compensation], except for services rendered in connection with the sale or purchase of goods . . ., either to the other party to such transaction or to an agent . . ., or other intermediary therein where such intermediary is acting in fact for or in behalf, . . . of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of the customer of such person . . . in consideration for any . . . facilities furnished . . . in connection with the processing, handling, sale or offering for sale of any product . . . manufactured, sold or offered for sale by such person, *unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodity.*

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale . . . *upon terms not accorded to all purchasers on proportionately equal terms.*"

The above legislation making it unlawful for a seller to practice price discrimination is constitutional.

Atlas Bldg. Products v. *Diamond Block*, 269 F 2d 950, cert. den. 363 US 843, 80 S Ct. 1608, 4 L ed 2d 1727.

Elizabeth Arden v. *F.T.C.*, 156 F 2d 132.

The purpose of these sections was to protect customers from and prevent price differentials except those based in full on cost savings.

Forster Mfg. v. *F.T.C.*, 335 F 2d 47.

Tri Valley Packing v. *F.T.C.*, (9th Cir) 329 F 2d 694.

There is no doubt that Section 1 of the Clayton Act 15 USC 15, defines all portions of 15 USC 13 relevant to this suit as part of the antitrust laws and violation thereof amenable to treble damages.

New Jersey Wood Furnishing Co. v. *Minnesota Min. & Mfg. Co.*, 332 F 2d 346, affirmed 85 S Ct 1473, 381 US 311, 14 L ed 2d 405

Monarch Life Ins. Co. v. *Loyal Protectors Life Ins. Co.*, 326 F 2d 841, cert. den. 84 S Ct 968, 376 US 952, 11 L ed 2d 971.

If the price difference complained of violates 15 USC 13, the plaintiff is entitled to treble damages regardless of whether there is a public injury and the civil remedy is not limited to competitors of the buyer.

Kentucky-Tennessee Light & Power v. *Nashville Coal*, 37 F Supp 728.

Normand v. *20th Century Fox*, 37 F Supp 649.

Simpson v. *Union Oil*, 84 S Ct 1051, 377 US 13, 12 L ed 2d 98.

Ames v. *Bostitch*, 240 F Supp 521.

In re McConnell, 82 S Ct 1288, 370 US 230.

Mead's Fine Bread v. *Moore*, 208 F 2d 777.

Congress was anxious to assure that no price discrimination occur in the American market place and all customers using a product in competition receive proportionately equal terms even to the extent of precluding allowances which might be used to disguise a price differential as said in Senate Report No. 1502 in H.R. No. 2287, 74th Congress, 2d Sess:

"Sections (c) and (d) of the bill addressed this by prohibiting the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment

> for such services or facilities when undertaken by the buyer except when accorded or made available to all competing customers on proportionately equal terms."

Congressman Utterback, Chairman of the House Conference, explains Sections (d) and (e), as contained in the final bill, in part as follows:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, were made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities, where furnished 'in connection with the processing, handling, sale, or offering for sale' of the product concerned." 80 Cong. Rec. 9418.

The instant cause involves a discrimination among purchasers in which the product of heavy equipment, pinsetters and bowling lanes, are used competitively. The equipment is used competitively as the bowling public pays a fee for the use. Of course, no "resale" is necessary under 13 (a), only (d) and (e). (a) involves either "use, consumption or resale within the United States."

One of the discussions of price discrimination under the Robinson-Patman Act is:

Second Revised Edition, Price Discrimination and Related Problems under the Robinson-Patman Act, the Joint

Committee on Continuing Legal Education of the ALI and ABA, Cyrus Austin, 1959.

We quote from this summary of both congressional intent and decided cases as it will indicate we feel compellingly that the appellant has stated a claim for relief and the appellee was not entitled to judgment on the record.

> "The Robinson-Patman Act (49 Stat. 1526, 15 USC 13) is a federal statute, enacted June 19, 1936, having for its purpose the prevention of discriminations in price and other discriminatory practices injuriously affecting free competitive enterprise. It was designed to afford protection against those practices to individual competitors at all levels of competition; to preserve competition generally and protect small business in particular.
>
> "The Robinson-Patman Act contains four sections, Section 1 amended Section 2 of the Clayton Act by enlarging it into six subsections numbered 2(a) to 2(f). These six subsections numbered contain the federal law of price discrimination as administered and enforced in civil proceedings by the Federal Trade Commission and by the courts.
>
> "Section 2(a) corresponds to old Section 2 of the Clayton Act. It materially amends and extends the prohibitions and provisos of old Section 2, but it remains the basic section prohibiting direct and indirect discriminations in *price* having any of the specified effects on competition. Certain affirmative defenses are permitted by the provisos, notably the justification of price differentials by differences in seller's costs.

"Section 2(b), 2(c), 2(d), 2(e) and 2(f) are new sections having no counterpart in old Section 2 of the Clayton Act, except that the 'meeting competition' proviso of old Section 2 is transferred in materially changed form to Section 2(b).

"Sections 2(c), 2(d) and 2(e) are designed to bring price discriminations into the open by absolutely prohibiting certain discriminations not directly reflected in price but which were found by Congress to have been commonly engaged in for the purpose or with the result of giving a competitive advantage to large buyers through preferential private arrangements and supplemental benefits not made available to the rank and file of small customers." Austin, pp 1-2.

"In reporting the bill favorably the Senate and House Committees emphasized the purpose to protect the competitive opportunity of the small business man by prohibiting all price differentials except those which could be justified by cost savings." Austin, p. 10.

The purposes of the bill were summarized in the Conference Report as follows:

"The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly in prices, including terms of sale; and sometimes by separate allowances to favorite customers for purported services or other considerations which are unjustly discriminatory in their results against other customers." H.R. Rep. 2951, 74th Cong., 2d Sess. 1936.

"The most frequently quoted definition of 'discrimination' as used in the Robinson-Patman Act is that given by Congressman Utterback, manager of the Conference Bill, on the floor of the House during debate on the bill:

> 'In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers: and there, too, a relationship may exist upon which to base the charge of discrimination.'

"The primary meaning of discrimination is a difference or distinction in treatment (Webster). It is in this primary sense that the terms 'discriminate' and 'discrimination' are used in Section 2(a), not in the secondary and more common sense of an unfair or unjust difference in treatment. This is true because Section 2(a) prescribes its own tests of what differences in price treatment are unfair or unjust. Unequal price treatment which may have any of the stated effects on competition, and otherwise falls within the affirmative prohibitions of Section 2(a), is a discrimination in price within the meaning of that section and is unlawful unless it can be justified by cost differences or otherwise." Austin, pp. 18-19.

Several meanings have been given to the word "discrimination" and again quoting from Austin:

> "Discrimination in price under Section 2(a) means more than a difference in prices only in the respect that unequal price treatment implies lack of availability of the lower price to purchasers paying the higher price." P. 21.
>
> "The significance of the added words, lies in the protection they afford to *individual customers* of the seller by limiting the scope of the competition which need be considered to competition with a single favored purchaser. Such provision, intended to reach discriminatory practices resulting in injury to the competitive opportunity of one or a few individuals, as distinguished from competition generally, was entirely new to our antitrust legislation."

Judge Woodbury in *Forster Manufacturing Co.* v. *F.T.C.*, 338 F 2d 47, cert. den. 380 US 906, noted that it appeared obvious that competitive opportunities were injured when one customer has to pay higher prices than a competitor, making it enough in showing a violation if it is reasonably possible that price discrimination may have such an effect. *F.T.C.* v. *Morton Salt Co.*, 334 US 37, 68 S Ct 335, 92 L ed 1196.

Analogously, the Dayco Corp. statement by Chairman Dixon that "*lower prices are not 'available' where a purchaser must alter his purchasing status before he can receive them*" indicates somewhat the involvement here. See also William H. Rorer, Inc., Trade Reg. Rep., Sec. 17, 264 (FTC docket 8599, 1965).

Naturally discrimination in price means difference in price.

Loren Specialty Mfg. Co. v. *Clark Mfg. Co.*, 241 F Supp 493.

Shore Gas & Oil v. *Humble Oil*, 224 F Supp 922.

A discrimination occurs where there has been two actual sales at a different price to two different actual buyers.

Jones v. *Netzger Dewies*, 334 F 2d 919.

Nat'l Dairy Products, 309 F 2d 943.

Valesco Products v. *Lloyd A. Fry Roofing Co.*, 346 F 2d 661.

The proof necessary to make a *prima facie* secondary line case, now before the court, in violation of 2 (a), is jurisdiction, commerce, discrimination in price, goods sold at both the higher and lower price for use, consumption or resale within the United States and a buyer affected competitively.

Enterprise Industries v. *Texas Co.*, 240 F 2d 457, cert. den. 353 US 965.

As said in the earlier case of *Moss, Inc.* v. *F.T.C.*, 148 F 2d 373, cert. den. 326 US 734:

> "Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result."

This is the interpretation expressed in two U. S. Supreme Court cases: *F.T.C.* v. *Cement Institute*, 333 US 683, 721, 68 S Ct. 793, 92 L ed 1009, and *Morton Salt*, above, 334 US at pp. 45-50; the court in Cement Institute providing that:

"Sec. 2(b) provides that proof of discrimination in price (selling the same kind of goods cheaper to one purchaser than to another) makes out a prima facie case of violation. . . ."

See also: 1 ALR 2d 267

Hershel Val. Fruit Products v. *Hunt Foods*, 221 F 2d 797.

Governmental Immunity or Exemption Raised Below

Congress saw fit through express statutory exemption to remove certain purchases and certain sales from the Robinson-Patman Act. These statutory exemptions are pointed and direct and one (15 USC 13 c) is involved in this suit. The intent of Congress to exempt by statute and to include all discriminations not so statutorily exempted is thus most manifest. The Congressional Committee hearings produced the clear aim that the area of applicability of the Act related to all competitive situations and non-applicability related to non-competitive situations. Not citing an appellate opinion upholding its contention but relying on three district court discussions the earliest of which stresses an Attorney General's opinion to the effect an enacting sovereign, the federal government, does not intend to have its legislative acts divest its present existing rights without clear words of such intent, the court below stretched this to a broader "exemption" affecting those dealing with foreign "sovereigns". We submit this the Act does not do; this Congress did not intend.

United States v. *Singer Mfg. Co.*, 83 S Ct 1773, 374 US 174, 10 L ed 2d 823.

The District Court held with the assertion of appellee in its briefs below that congress did not intend to exercise its full commerce power to include sales to states, but rather intended by implication, not found in the wording of the act, to restrict or limit federal antitrust laws to render a seller immune from Robinson-Patman Act discriminatory price violations when dealing, not just with the federal government, the enacting sovereign, but with any sovereign state. This implied intent, again not found in the wording of the act, was asserted by appellee in brief below: "Under these circumstances by virtue of the participation of the sovereign in the transaction, which is authorized and regulated by state statutes, the federal antitrust laws are inapplicable."

We thus start our analysis by first considering the intended extent of coverage of the antitrust laws as judicially determined by past appellate court rulings.

Congress in passing the antitrust laws left *no area* of its constitutional power unoccupied; it "exercised all the power it possessed"; or, differently put, congress in the antitrust laws meant to and did exercise the full extent of its commerce power granted by the constitution.

Trans-Missouri Freight Case, 17 S Ct 540, 166 US 290, 41 L ed 1007.

United States v. *Frankfort Distilleries*, 65 S Ct 661, 324 US 293, 89 L ed 951.

United States v. *Union Pacific*, 226 US 61, 33 S Ct 53, 57 L ed 124.

United States v. *Southeastern Underwriters Association*, 64 S Ct 1162, 322 US 533, 88 L ed 1440.

Standard Oil of New Jersey v. *United States,* 31 S Ct 502, 221 US 1, 55 L ed 619.

Chattanooga Foundry & Pipe Works v. *City of Atlanta,* 27 S Ct 65, 206 US 390, 51 L ed 241.

United States v. *American Tobacco,* 221 US 106, 31 S Ct 632, 55 L ed 663.

Marriott Hotels v. *Heart of Atlanta Hotel,* 232 F Supp 270.

This recognition of the intent of congress to completely exercise the power derived from Article I, Section 8, Clause 3 of the Constitution of the United States has been recognized from the first cases construing the anti-trust laws to the present. This circuit recognizes such intent and the federal preemption over the objects covered. In the cause of *United States* v. *Chrysler Corp. Parts Wholesalers,* 180 F 2d 557, 559 (9th Cir 1950), this court after first dogmatically stating the proposition on page 559, then again noted such intent in stating:

> "It is well established that the commerce power of Congress, and the Sherman Act, *which is a complete exercise of that power,* extends to intrastate transactions which substantially affect interstate commerce. Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 US 219, 68 S Ct 996, 92 L ed 1328.
>
> * * *
>
> "Restraints on retail sales of goods within a state which were purchased outside the state have been held to so affect interstate commerce as to be within the scope of the commerce power and the Sherman Act. United States v. General Motors, 7 Cir, 212 F 2d 376, 401-402; cf., N.L.R.B. v. Van De Kamp's, 9 Cir,

152 F 2d 818. 'The control of the handling, the sales and the prices at the place of origin * * * or in the state of destination * * * may operate directly to restrain and monopolize interstate commerce' Local 167 v. United States, 291 US 293, 297, 54 S Ct 396, 398, 78 L ed 804." [our italics]

Las Vegas Merchant Plumbers v. United States, (9 Cir 1954) 210 F 2d 732, 739-740, noted:

"In the enactment of the Sherman Act Congress exercised *its full power over interstate commerce.* . . . [cases cited]"

"The Sherman Act therefore extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially affect interstate commerce. . . . [Cases cited]" [our italics]

The commerce power so intended to be fully exercised is, indeed, today very broad.

Heart of Atlanta Motel v. *United States,* 85 S Ct ..... , 13 L ed 2d 12.

Standard Oil v. *FTC,* 173 F 2d 210, 214, 340 US 231, 236-238, 71 S Ct 240, 95 L ed 239.

Harf v. *United States,* 235 F 2d 710, 718.

Hostetter v. *Idlewild,* 377 US 324, 84 S Ct 1293, 12 L ed 2d 350.

Collins v. *Yosemite Park Co.,* 304 US 518, 58 S Ct 1009, 82 L ed 1502.

SEC v. *Chenery,* 188 F 2d 100, 87 F Supp 289, cert. den. 341 US 953, 71 S Ct 1018, 95 L ed 1375.

Wickard v. *Filburn,* 317 US 111, 63 S Ct 82, 87 L ed 122.

Had it not been for observations in several attorney general opinions in the 1930's and dictim in three *nisi prius* cases, some years back, there would be no doubt but that Congress intended to and did in fully exercised its federal commerce powers embrace the several states in included prohibitions covered in the antitrust laws. In doing so an invasion of states' rights has not occurred.

See Liquor cases, hereafter.

Commerce Clause, Article I, Sec. 8, Constitution of the United States.

Article IV, Sec. 2, Constitution of the United States.

Article V, Constitution of the United States.

When Congress has entered the field enacting legislation affecting interstate commerce all inconsistent state legislation is superceded.

Illinois Natural Gas Co. v. *Central Illinois Pub. Serv. Co.*, 314 US 498, 86 L ed 371, 62 S Ct 384.

Cloverleaf Butter Co. v. *Patterson*, 315 US 148, 86 L ed 754, 62 S Ct 481.

The same is true when a state act or statute although not in express conflict nevertheless stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hines v. *Davidowitz*, 312 US 52, 85 L ed 581, 61 S Ct 399.

The act in its own words clearly does not include a governmental exemption, and when unambiguous effect should be given to what the statute plainly intends by reference to what it says:

Holmes, Collected Legal Papers 207.

Soon Hing v. *Crowley,* 113 US 703, 710, 711, 58 S Ct 730, 28 L ed 1145, 1147.

The definitions of "person" and of "commerce" indicate the entities covered and activity embraced in the antitrust laws.

15 USC 12, *inter alia*, defines "person" and also "commerce":

> " 'Commerce', as used herein, *means trade* or commerce *among the several States* and with foreign nations, *or between* the District of Columbia or any Territory of the United States *and any State*, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, that nothing in this Act contained shall apply to the Philippine Islands.
>
> "The word 'person' or 'persons' *wherever used in this Act shall be deemed to include* corporations and *associations* existing under or *authorized by* the laws of either the United States, the laws of any of the Territories, *the laws of any State*, or the laws of any foreign country." (Our italics).

The states have been held to be "persons" in the meaning of the antitrust definitions:

Georgia v. *Evans,* 62 S Ct 972, 316 US 159, 86 L ed 1346.

Georgia v. *Pennsylvania Railroad,* 65 S Ct 716, 324 US 439, 89 L ed 1015.

Illinois v. *Brunswick Corporation,* (1963) 32 FRD 453.

California v. *Brunswick,* 32 FRD 36.

The cities of a state are "persons".

Chattanooga Foundry & Pipe Works v. *City of Atlanta,* 27 S Ct 65, 203 US 390, 15 L ed 241.

Immunity and Cases Cited by Trial Judge

Under acts such as the federal Robinson-Patman Act the federal government unless it waives the advantage might be immune from private action, but in application of the federal law, the cases show no immunity of the several states in light of federal pre-emption. Indeed, the constitutional standards of equal protection and due process might well preclude legislation allowing each state to in effect take property of a private firm without compensation by the device of allowing the state to exempt sellers from coverage. Art. IV and Amendment 14, Constitution of the United States.

The appellant suggests, with the possible exception of sales to the enacting sovereign which in this case is the federal government, the intent shown is full coverage of all but plain statutory exemptions and the rationale of any exclusion of a state or others alike is keyed to buyers competing in a market. For this reason and this reason only government purchases at a lower price than to others where no competing purchaser is affected are excluded. It is incorrect to assert the Act does not apply to a transaction in which any "sovereign" is involved or that such

transactions are exempt. The intent expressed in the act is only that the discrimination must occur within the United States. The inquiry of immunity is irrelevant unless a sovereign itself is sought to be held. No sovereign is sued in this case. While the states might enjoy the benefits of the doctrine of sovereign immunity (subject to congressional action regulating commerce) and under this doctrine remain unsusceptible to suit certainly a private seller is not so exempted in a violation of the antitrust laws. State involvement does not protect a private corporation by making an illegal act legal.

Utah did not authorize or attempt to authorize Brunswick to violate the federal act. The state did not tell Brunswick how much to bid or to bid or sell lower for student union facilities than Brunswick sold or was selling to other buyers competing in the bowling business in Cache County. The defense is similar to that submitted by the railroad carriers and rejected by the Supreme Court in *United States* v. *Trans-Missouri Freight Association*, 166 US 318, 17 S Ct. 518, 41 L ed 1019. In that case an exemption by implication was urged because of the commerce act and here Brunswick urges such because of the state involvement.

As to regulation of interstate commerce the states submitted to federal control and so waived immunity in this and other areas of federal pre-emption when the constitution was ratified and adopted or when admitted into the union.

The proprietory function or governmental function conventionally used in determining the immunity of states

and municipalities is not really directly applicable as the immunity question itself is not involved unless a sovereign or its instrumentality is sued. The distinction is useful only as an equation in the Robinson-Patman applications since the federal legislation pre-empts the field. Exclusion of sales to state agencies is not because of any exemption or immunity, but because there is a violation of the law only when the property sold in the market place is used in competition with another buyer. Competition was the rationale repeatedly used at the congressional hearings. The philosophy of the act is that goods should not be sold in the market place to private persons, states or state agencies at a discriminatingly low price whenever that property is to be used in competition with another buyer who is buying and using such like property in competition with that of the buyer receiving a discriminatory price. We have found no statement at Congressional hearing or appellate court level inconsistent with this basic intent and purpose. Actually, for this reason, many commodities purchased by states or municipalities (not through exemptions or immunities, but because the very purpose of the governmental function in purchase is not in competition in any market) might well appropriately be sold without violating Robinson-Patman. In fact, as in other areas of government purchase, a seller can always request a statement from a state or municipality or governmental agency that the article purchased is neither intended nor to be used in proprietory competitive functions or in commerce and competitive commercial endeavors. This procedure is not without precedent to avoid

the impact of tax or police regulations imposed on commercial transactions.

The most recent case decided and cited by the court below considers *sales to the federal government. Sperry Rand Corp.* v. *Nassau Research and Dev. Assoc.*, 152 F Supp 91. With preliminary reference to the short disclaimer (which did not change the result of the opinion) on page 96, the following quotation on basic rationale is made from page 95 of this 1957 opinion:

> "The plaintiff urges that a sale to the United States Government does not fall within the scope of the Robinson-Patman Act, but cites no cases in which it has been held that sales to the Government fall outside the above quoted provision; and the contrary to that position seems to be stated in A. J. Goodman & Son v. United Lacquer Mfg. Corp., DC 81 F Supp 890, on page 893, from which the following quotation is pertinent:
>
> > 'The complaint sets forth sufficient facts to show that plaintiff and defendant were competitors, since they were rivals for the business of selling lacquer to the State of New Hampshire. It describes the basic facts of an alleged course of conduct by defendant which might on further proof justify a finding that defendant acted for the purpose of eliminating plaintiff as a competitor. Nor can I hold, in the absence of further evidence, that the price of $1.75 was not unreasonably low. Consequently, I hold that on this point, the complaint properly alleges a violation of Sec. 13a.' [Note: 13a, the Borah-Van Nuys bill, is not 13 (a), part of the amended Patman bill affecting 2 (a) of the

Clayton Act, the former requirements as to effect on competition not being involved in the 13 (a) discrimination proof.]

"A recent discussion of this statute will be found in Moore v. Mead's Fine Bread Co., 348 US 115, 75 S Ct 148, 99 L ed 145. This was a case in which the defendant was charged with having cut prices in intrastate transactions and driving competition out of business, and the court discusses the different prices quoted by the defendant in its intra as distinguished from its inter state business. In reversing a decree for the respondent, the court uses this language at page 120 of 348 US, at page 151 of 75 S Ct:

'It is, we think clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent.'

"As to the right of private litigant to recover damages under the quoted Section, see Vance v. Safeway Stores, Inc., 10 Cir, 239 F 2d 144, at page 146.

"Without unnecessarily prolonging this opinion, it will suffice to state that the defendants' amended pleading as to these challenged paragraphs cannot be held to be deficient as a matter of law, and consequently as to them the motion to dismiss as a counter claim will be denied."

The comments made by Judge Thompson in *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F Supp 393 (both the case here under consideration and that cause being concerned with the Robinson-Patman Act statutory additions to the Clayton Act, although Rangen specifically involved 15 USC 13 (c) rather than 13 (a)), bear on the contention

of appellee that the antitrust laws do not apply with respect to sales to sovereigns. The exact language of Judge Thompson found on page 399 is:

> "Defendants also argue that the antitrust laws do not apply with respect to sales to a sovereign state. We do not agree. The only purpose of such an exception of which we can conceive is to preserve the right of a sovereign to purchase goods as cheaply as possible irrespective of the price to private customers. No problem of this sort is involved here. If we have correctly interpreted Section 13 (c) as an express prohibition of commercial bribery no reason occurs to us why such misconduct should not be actionable with respect to sales to a sovereign as well as sales to a private citizen or corporation. Compare: Union Carbide and Carbon Corporation v. Nisely, (10 CCA 1962) 300 F 2d 561; Bankers Life & Casualty Co. v. Larson, (5 CCA 1958) 257 F 2d 377; Pfotzer v. Aqua Systems, (2 CCA 1947) 162 F 2d 779."

The implication by this circuit in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F 2d 851, points to a reserved doubt of such exemption as urged by appellee. Of course, nothing prevented, at any time in its sales to the State of Utah, or for that matter to any other person or entity, the appellee, Brunswick, from giving equal price consideration to the appellant and others. Brunswick is free to charge as low a price as it wishes, so long as the prices it charges in a competitive market place whether to a state or other private party or entity, are not discriminatory, that is, not less to one than to another. The federal act precludes the discrimination.

A third case cited by the court below, *General Shale Products Corp.* v. *Struck Construction Co.*, 37 F Supp 598, states rather dogmatically that the power of Congress in this field is plenary. Actually, the court in *Shale* had some difficulty in 1941 with the then contemporary cases interpreting the Commerce clause power, five years after enactment of the Robinson-Patman Act. The opinion is of interesting historical value and the court reasoned that a construction company incorporated under Kentucky law and qualified to carry on business in other states when entering into a contract with the City of Louisville Municipal Housing Commission for clearance of a slum was engaged in interstate commerce in contemplation of Robinson-Patman price discrimination and that the Robinson-Patman Act applies to commercial sales on the part of those who deal in a commodity although the court held, under the facts then before it, the purchasers were not in that situation in *competition with each other.* The purchaser discriminated against was not in competition with those receiving favorable treatment. The basis of the lower court's dictum that the Act did not apply to certain sales to the government, states or municipalities, was based on the analysis:

> "Accordingly, selling at a reduced price is not illegal *unless it is made for the purpose of discriminating between competitive buyers.*" (Our italics).

General Shale was affirmed on grounds not related to any purported exemption or the contention as relied on by appellant, but on the completely unrelated ground that the purchasers were not competing for the same

market. Thus, *General Shale* established no other principle than that in which the district court was upheld on appeal.

This early opinion confuses somewhat the proof requirements involved in first line and secondary line competition which in the embryo development of the act's philosophy certainly is understandable. The court noted by way of passing a quotation from Attorney General Cummings relying on *Dollar Savings Bank* v. *United States*, 22 L ed 80, that when a sovereign passed a law it will be assumed not to apply to that sovereign, this, as the court indicated, being left over from the old English principle: "It is a familiar principle that the king is not bound by any act of Parliament unless he be named therein by special and particular words." The executive is not bound by acts of the federal legislature unless the federal legislature specifically so indicates. We would submit there is error in construing this further than that indicated, and that the court correctly having stated the rule of federal pre-emption in interstate commerce should have logically concluded that unless Congress specifically so provide the actions of the states themselves would be included and most assuredly the act will govern the activity of others with whom the state commercially deals. The court noted the Attorney General of California issued an opinion contrary to state exemption even at that early date. It is a judicial rule that in construing a legislative enactment before the judiciary will feel authorized to put an interpretation upon a statute to restrict or diminish the rights of the government it must be clear that the legislature so

intended the enacting sovereign itself to be bound. We do not now brief the obvious but unrelated point that because of the position of the federal government this rule of construction might be justified in the interpretation of the legislative acts of a state for federal protection, but obviously the rationale of the many supreme court decisions compel the reverse is certainly not true.

The District Court's last case authority was *Sachs* v. *Brown-Forman*, 134 F Supp 9, wherein the court noted by way of passing that there was some doubt as to Robinson-Patman application on a sale to state or federal government agencies. Such observation in the 1955 decision, involving the OPA ceiling prices and the old wartime acts, in view of subsequent supreme court decisions is hardly of compelling significance today.

The limited effect of state action on the thrust of the federal antitrust laws, however, is dramatized in the area of liquor control considered in *Sachs*—a field in which a state is unconfined by traditional commerce clause limitations "when it restricts the importation of intoxicants destined for use within its borders." Even with the express constitutional grant of state authority restricting federal intervention, we have this expression from the United States Supreme Court in *Nippert* v. *Richmond*, 327 US 416, 66 S Ct 590, 90 L ed 760:

> "Thus even the commerce in intoxicating liquors, over which the Twenty First Amendment gives the states the highest degree of control is not altogether beyond the reach of the federal commerce power, at any rate when the states' regulation squarely conflicts with

regulations imposed by Congress governing interstate trade or traffic."

Also see: *United States* v. *Frankfort Distilleries,* 65 S Ct 661, 324 US 293, 89 L ed 951.

Joseph E. Seagram & Sons, Inc. v. *Donald S. Hostetter,* 86 S Ct 1259, 15 L ed 2d 336.

Hostetter v. *Idlewild Liquor Corporation,* 377 US 324, 84 S Ct 1293, 12 L ed 2d 350.

When specifically discussing the Robinson-Patman Act and antitrust laws, the court in *Seagram* said:

"In this as in other areas of coincident federal and state regulations, the 'teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exist. . . .' We find no such law conflict in the present case. The bare assembly without more, of price information on sales to wholesalers and retailers to support the affirmation filed . . . would not of itself violate the Sherman Act.

"We cannot presume that the Authority will not exercise that discretion, to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or other federal statutes."

Even in light of the specific allowance of state enabling legislation the federal act so completely pre-empts the field that the exemption has been strictly confined consistent with federal antitrust policies.

Schwegmann Bros. v. *Calvert Distillers Corp.,* 341 US 384, 95 L ed 1035, 71 S Ct 745.

As said by the majority in *Schwegmann* "the fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress."

Certainly even if Utah is immune itself from suit it is not a necessary party, and a cause based on Robinson-Patman price discrimination may be maintained against one or several, the discriminating seller or the benefited buyer or both at the option of a harmed buyer.

Nat'l Wrestling Alliance v. *Myers*, 325 F 2d 768.

Kainz v. *Anheuser-Busch*, 194 F 2d 737.

Krosch v. *Texas Co.*, 167 F Supp 947.

The decided cases certainly give no credence to extending civil suit immunity of a sovereign to those with whom the sovereign bargains or bids or others with whom a sovereign might deal in violation of antitrust laws.

Union Carbide and Carbon v. *Nisely*, 300 F 2d 561.

A. J. Goodman & Son v. *United Lacquer Mfg. Corp.*, 81 F Supp 890.

Does appellee contend that a state can by its statutes, contracts or actions authorize rebates from a railroad to an oil company, preferences, discrimination, pooling, individuals to contract with each other or with it to restrain trade and suppress competition? Or that such activity by a private corporation will be protected if a state either regulates the field or gains by contracting for the rebate or preference?

Knowledge or acquiescence of government officials in wrongdoing will not give validity or legality to acts in violation of the antitrust laws.

United States v. *Socony Vacuum Co.*, 310 US 150, 60 S Ct 811, 84 L ed 1129.

cf *Ex Parte Young*, 209 US 123, 28 S Ct 441, 52 L ed 714.

cf *Worcester County Trust Co.* v. *Riley*, 302 US 292, 58 S Ct 185, 82 L ed 208.

Utah, its Building Board, the University, or the Student Union Association are not necessary parties.

American Can Co. v. *Bruce's Juices*, 87 F Supp 985; 187 F 2d 919 (5th Cir.); also: 190 F 2d 73.

Bruce's Juices v. *American Can Co.*, 330 US 743, 757, 67 S Ct 1016, 91 L ed 2d 1219 (1947).

The antitrust action defined by federal statutes being a concept and claim unknown to the common law common law principles must not be applied in such actions without great caution to avoid a grotesque result.

Philco v. *R.C.A.*, 196 F Supp 155.

Duff v. *Kansas City Star*, 299 F 2d 320.

Wheeler-Stezel Co. v. *Nat'l Window Glass*, 152 Fed 364.

The historically early "commerce" restrictions on the allowable activity regulated by the antitrust laws must be considered in light of current interpretation and especially that of the years immediately past so, in spite of *Apex Hosiery* rule unions are not exempt if actually participants in aiding outside groups in violations. The indication is that any exemption in the antitrust laws are to be strictly confined even when the act involves other agencies created by the enacting sovereign.

Las Vegas Merchant Plumbers v. *United States,* 210 F 2d 732.

United Mine Workers v. *Pennington,* 381 US 657, 14 L ed 2d 626, 85 S Ct 1585.

Agricultural Cooperative Cases

The lesson of the supreme court decisions in the past fifteen years is that the federal antitrust acts will apply to state activities and the federal act is not affected by state legislation. While we do not digest at all those views the appellee urged below that *Parker* v. *Brown,* 317 US 341, 87 L ed 315, 63 S Ct 307 (1943), through Chief Justice Stone, implied a congressional intention that a state in the federal union if a participant as an actor in an antitrust violation exempted or immunized what would otherwise be illegal, or that a state such as Utah can itself grant immunity to another such as Brunswick who violates one of the antitrust laws in dealing with the state. While the court's interpretation of the commerce power was then more restricted than presently viewed, these points were specifically noted.

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful Northern Securities Co. v. United States, 193 US 197, 332, 334-347, 48 L Ed 679, 698, 703, 704, 24 S Ct 436; and we have no questions of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade. cf Union Pacific Railroad Co. v. United States, 313 US 450, 85 L ed 1453, 61 S Ct 1064."

* * *

> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. . . ." 87 L ed 326-327, 337 US 351-352.

Does not the opinion itself while conceding the power of Congress to preempt the field under the commerce clause hold the state regulations there considered were "never intended to operate by force of individual agreement or combination"? In context the language of the opinion applies only to a program policing by state regulations or state officials an industry or business. The court went out of its way to note the state would not be excluded from the antitrust laws if it were a participant implying it would be included if itself conspiring or contracting in violation of the law.

Parker v. *Brown* must be considered in light of the decisions since that date touching upon the commerce power of Congress, which power Congress has repeatedly held to have exercised to the *full extent* in the sweep of the antitrust statutes.

In this field of agricultural cooperatives we have the expression of Judge Meredith in *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers*, 241 F Supp 476, that although an agricultural cooperative was made exempt from antitrust laws under sections 1 and 2 of the Capper-Volstead Act and Section 6 of the Clayton Act, the exemptions are inapplicable "to actions of an agricultural cooperative with respect to other non-cooperative corporations or individuals

and as to these an agricultural cooperative is subject to the antitrust laws the same as any other corporation or person." The FTC found much the same in *Washington Crab Association,* Trade Reg. Rep., Sec. 17,004 (F.T.C. Docket 7859, 1964) and cited: *Maryland & Virginia Milk Producers Assoc.* v. *United States,* 362 US 458, 80 S Ct 847, 4 L ed 2d 880 (1960). The Bergjans case cited with approval *Tillamook Cheese and Dairy Assn.* v. *Tillamook Co. Cream Assn.,* 358 F 2d 115, 118.

Sunkist Growers v. *Winckler & Smith,* 370 US 190, 82 S Ct 1130, 8 L ed 2d 305.

United States v. *Borden Co.,* 308 US 188, 60 S Ct 182, 84 L ed 181.

The recent cases dealing with cooperatives are more relevant in that not only is the federal exclusionary enactment applicable but all the states have apparently passed acts specifically authorizing the existence of agricultural cooperative activity.

Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt L Rev 181, 191, n 29 (1948);

38 Harv L Rev 87, 89 n 17 (1942).

The court in Parker specifically held a state could not grant immunity to those with whom it as a state might contract or participate as the federal government alone has this right to grant exceptions under its constitutional preemption.

Just as *United States* v. *Intl. Boxing Club of New York,* 348 US 236, 75 S Ct 259, 99 L ed 290, limited *Federal Baseball Club* v. *National League,* 259 US 200, 42 S Ct

465, 66 L ed 898, and *Toolson* v. *New York Yankees, Inc.*, 346 US 356, 74 S Ct 78, 99 L ed 64, strictly to baseball so, the recent cases indicate, should *Parker* v. *Brown* be limited strictly to regulatory activity and even there perhaps to agricultural cooperatives, and then not to exempt those with whom the cooperatives contract.

Thus, the sweep of the general statutes governing antitrust regulation can be seen from analogous application in the unique area of state power over liquor, in the area of federal-state encouragement of agricultural coops, in the area of competing federal statutory schemes of common carriers and labor regulation. In each case the act broadly speaking applies except where plainly shown not to be intended. As observed in *United States* v. *International Boxing Club and United States* v. *Shubert*, 348 US 222, 99 L ed 279, 75 S Ct 271, when dealing with prior restrictive interpretation of a long standing act to the broadening sweep of commerce power:

> "The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve not this court. See United States v. South-Eastern Underwriters Association, 322 US 533, 88 L ed 1440, 64 S Ct 1162."

The obviously valid standard of judicial direction in such an area is found in *Gold* v. *Di Carlo*, 235 F Supp 817, affim'd 380 US 520, 14 L ed 2d 266, 85 S Ct 1332:

> "We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words 'We hereby overrule Tyson,' . . . before recog-

> nizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles; they and the law must keep pace with our vibrant and dynamic society and the changes in the law which the courts have pronounced."

Non-Profit Institution Exemption

15 USC 13 c (May 26, 1938, c. 283, 52 Stat 446) provides:

> "Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

A very genuine issue of material facts was meant to be raised and was raised by affidavits of appellant, although appellant had not acquired or had opportunity to acquire through depositions and discovery and use of subpoena of customers in the area at the time of hearing on motions leading to granting summary judgment a showing as to the full extent of public use of student union building facilities. Appellant did directly dispute the extent of public use alleged in the affidavits presented by appellee. Note: The Affidavit of Donald D. Kvarfordt, Exhibit 1 (R 55-57) in which he states observing the operation of the union building for five years and that it appears most probable that the records submitted by appellee do not actually separate or show student lineage from other bowling lineage, and further setting out a course of conduct indicating

that the bowling facilities have been and are used by the general public, and that, in fact, the person in charge of such facilities thought "it was too much of a job to try and identify the students and the non-students for purposes of records of charges." Other affidavits were submitted by persons not at all associated with the university who had used and observed the use of bowling facilities by the general public (R 58-64). Generally they show conclusively genuine issue of fact on the extent of public use and that the goods sold at the discriminatory prices, if considered "supplies", were not for "their own use" of the competitor but were for competitive use in serving the market in which appellant competes.

The record thus had issues of fact which preclude granting of summary judgment.

Rule 56, FRCP.

Deterjet Corp. v. *United Aircraft Corp.*, 211 F Supp 348.

Ames v. *Bostitch*, 240 F Supp 521.

Automatic Radio v. *Ford Motor*, 35 F.R.D. 198.

Valesco Products v. *Lloyd A. Fry*, 346 F 2d 661, also see 308 F 2d 383, cert. den. 83 S Ct 721, 372 US 907, 9 L ed 2d 717.

New and Used Auto Sales v. *Handa*, 245 F 2d 951.

Sutton v. *Brown*, 85 Ida 104, 375 P 2d 990.

A reading of this Statute requires a definition of "purchases" and "supplies" and in relation to the two words "their supplies" and of the words "for their own use". Naturally in the latter Congress had in mind not just "for their use" but the entire wording "for their *own* use", and,

"purchases" might imply that Congress meant not to make the exemption generally applicable to "*sales to* and purchases by" but only to "purchases by". The Act thus seems to be limited only to exempt the purchaser in its purchases "*by*" and not a seller. Appellee suggests the intent in granting the exemption only to those non-profit institutions purchasing and not exempting those selling. The wording is "to purchases . . . by schools. . . ." We could assume that the seller would remain liable in violation in case of discrimination but that qualified purchasers are exempted.

However, more compelling considerations indicate that this exemption is not involved in this case, for Congress did not provide that the exemption apply generally "to purchases by schools, colleges", but specifically added words of great limitation "of their supplies" and then further broadly limited this exemption further through the words "for their own use". It is submitted that the defendant must plead and show that the exemption as so limited is involved in this case, and this attack on motion hardly seems the office to decide this suit on this exemption involving mixed questions of law and fact. Also, the fact question is presented in which the appellee, we would submit, must show that the purchases involved were within the definition of "supplies" and were actually for and meant to be for its own use by the school involved. If the commodities purchased were not supplies then the exemption is inapplicable, and for the use of the public generally we would submit then would hardly be "for their own use" and the exemption is inapplicable. The very reason given by the Congress as to usage becomes a fact question as to

why exactly and for what purpose the purchases were involved. Also, we would submit that inherent within the definition of operating the listed institutions and then adding the words "for their own use" is meant in this case for use in carrying out the function of schooling, and certainly running a bowling alley open to the public for a valuable consideration hardly would be "for their own use".

The definition is limited to supplies, which we suggest was meant to be items of stock, materials and provisions to carry on the operation, not the purchase of capital items or major facilities for competitive use in selling services to the public.

Student Book Company v. *Washington Law Book Co.*, 232 F 2d 49, discusses the problem. The courts in cause considered the question under all the facts after trial. On appeal the court only mentioned the asserted defense in a footnote, stating:

> "Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 Stat. 446, 15 USC, Sec. 13 c. . . .
>
> "Although the appellee has sold books to all three of the universities for their own use, i.e., for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities but for resale at a profit. The exemption provision is therefore inapplicable to these transactions."

Was the student union self-sustaining? Were the bowling alley facilities used in the student union rented for a

profit? Were the lanes and facilities actually operated for public use at a profit? Is the student union body itself private and not charitable? Unexplained by Mr. Swenson in his affidavit for what use and purpose was the bowling alley equipment purchased? To what extent if at all, was the university involved in the operation, in the policy, in the programs, in the charges, not in the use of the building generally but in the use of the bowling alleys in the building?

Now, the present attempt of appellee to stress dismissal of the action, nipping the preliminary discovery attempted in the first set of interrogatories off at the bud becomes apparent. The appellant is entitled to all the facts, not just those the defendant has found advantageous to submit as relevant. Many fact questions are inherent in arriving at a correct conclusion. The trial court should have full benefit of all the facts. Justice requires no less.

Summary Judgment—Law

The factual issues, as to whether a seller did play a "favorite" in price among two or more purchasers precludes granting either a motion to dismiss or a motion for summary judgment.

Rayco Mfg. Co. v. Dunn, 234 F Supp 593.

Valesco Products v. *Lloyd A. Fry,* 346 F 2d 661.

On the motion for summary judgment only the facts most favorable to appellant and the most permissible inferences from those facts may be considered.

Warner v. *Lieberman,* 154 F Supp 362.

Golaris v. *Procter and Gamble,* 153 F Supp 34.

Summary Judgment should not be granted if there is a genuine issue of any material fact, and these judgments should be issued sparingly in antitrust cases.

Rule 56 (a), FRCP.

Potter v. *Columbia Broadcasting,* 368 US 464, 82 S Ct 486, 7 L ed 2d 458.

Leh v. *General Petroleum,* (Cal 1958) 165 F Supp 933.

Greenleaf v. *Brunswick-Balke-Collender,* (Pa 1947) 79 F Supp 362.

Automatic Radio v. *Ford Motor,* (Mass 1964) 35 FRD 198.

Moore Co. v. *Richardson,* (Mo 1964) 237 F Supp 817.

Waldron v. *British Pet. Co.,* (NY 1964) 231 F Supp 72.

Woods Exploration & Producing Co. v. *Aluminum Co. of America,* (Tex 1963) 36 FRD 107.

The use of Summary Judgment in an antitrust action is discussed by Timberlake in his work "Federal Damage Antitrust Actions", Callaghan and Company, in Chapter 12. We now quote from parts of sections 12.01 through 12.03 citing the footnote cases in the text rather than in the page bottom:

> "Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment. 'The law is well settled that in order to entitle the moving party to summary judgment, it must be clearly shown: (1) That there is no genuine issue as to any material fact in the case; and (2) that he is entitled to a judgment in his favor as a matter of law.' (National Screen

Service Corp. v. Poster Exchange, Inc., 305 F 2d 647 (5th Cir 1962).

"It is not the purpose of summary judgment to substitute trial by affidavit in lieu of a full trial and the grant of a motion for summary judgment is not appropriate when there is a bona fide dispute as to any material fact between the parties. (National Screen Service Corp. v. Poster Exchange, Inc., 305 F 2d 647, 651 (5th Cir 1962). Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear where the truth is and when no genuine issue remains for trial. (Potter v. Columbia Broadcasting System, 368 US 464, 467, 1962; Sartor v. Arkansas Natural Gas Corp., 321 US 620, 627, 1944; Associated Press v. United States, 326 US 1, 1945; Eccles v. People's Bank of Lakewood Village, 333 US 426, 1948 . . .

"The party moving for summary judgment has the burden of demonstrating that there is no genuine issue of material fact. (National Screen Service Corp. v. Poster Exchange, Inc., 305 F 2d 647, 651 (5th Cir 1962)). Of course, affidavits filed in support of a motion for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue. Wholesale Auto Supply Co. v. Hickok Mfg. Co., 221 F Supp 935, 944 DNJ 1963). A grant of summary judgment will be reversed where the court draws fact inferences. (Bragen v. Hudson County News Co. Inc., 287 F 2d 615, 3rd Cir 1960). It is no part of the duty of the court to decide fact issues, but only to determine whether there are fact issues to be drawn (National Screen Service Corp. v. Poster Exchange, Inc., 305 F 2d 647, 651 (5th Cir 1962)).

"The trend of the courts (is) not to dispose finally of antitrust litigation upon the pleadings without giving the plaintiff full opportunity to formulate his charges (McElhenny Co. v. Western Auto Supply Co., 269 F 2d 332, 339, 4th Cir 1959. In Waldron v. British Petroleum Co., Ltd., 1961 Trade Cases Para 69, 978 SDNY 1961, summary judgment was denied as discovery had not been completed.) (Smith Corona Marchant, Inc. v. American Photocopy Equipment Co., 217 F Supp 39, 40 SDNY 1963).

"The serious nature of the charges in antitrust cases and the fact that the proof 'will be peculiarly within the knowledge or control of the defendants' have been relied upon as reasons why the plaintiff should be granted the opportunity of proceeding with its discovery in accordance with the appropriate rules, before being foreclosed by summary judgment. (Curto's Inc. v. Krich-New Jersey, Inc., 193 F Supp 235, 238 DNJ 1961. In Castlegate, Inc. v. National Tea Co., 1963 Trade Cases, Para 70, 962 D Colo 1963, a motion for summary judgment was denied without prejudice to renew, even though there were many gaps in plaintiff's proof and plaintiff had many difficulties. Accord: Philco Corp. v. Radio Corp. of America, 34 FRD 453 ED Pa 1964).

Procedural Errors

Appellant has heretofore set out in the Statement of the Case the background from which it is urged most serious and obvious error was committed by the court in denying the motion of the appellant to compel answers to interrogatories and in not considering admissions requested as deemed admitted. This is not only based on Rule 7

of the District Court (R 35) which the District Court most assuredly ignored in erroneously granting the motion of appellee but on abandoning the letter and spirit of the Federal Rules of Procedure. Reference is made to the record 40-42 containing the brief below in support of the motion to compel answers to interrogatories. Rule 33, Federal Rules of Civil Procedure, in relevant portion, provides:

> "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories *within 15 days after the service of the interrogatories,* unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. *Within 10 days after service of interrogatories* a party may serve *written objections* thereto together *with a notice of hearing the objections at the earliest practicable time.* Answers to interrogatories to which objection is made shall be deferred until the objections are determined." (our italics).

Appellant submits that the Appellee has waived any objections to the Interrogatories and must now answer same fully and completely under oath.

See cases cited: Record 41-42.

Rule 36, Federal Rules of Civil Procedure in relevant part, provides:

"REQUESTS FOR ADMISSION. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. *Each of the matters of which an admission is requested shall be deemed admitted unless,* within a period designated in the request, *not less than 10 days after service thereof* or within such shorter or longer time as the court may allow on motion and notice, *the party to whom the request is directed serves upon the party requesting the admission of either* (1) *a sworn statement denying* specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) *written objections* on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only

a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder." (Our italics).

The rule seems self explanatory and appellant contends that objection must be made and actually the motion and notice timely made or there is an admission made.

Walsh v. *Connecticut Mutual Insurance Co.*, 26 F Supp 566.

Hise v. *Lockwood Grader*, 153 F Supp 276.

Princess Pat Ltd. v. *National Carload Corp.*, 223 F 2d 916.

Creedon v. *Rielly*, 8 F.R.D. 265.

Dulansky v. *Iowa-Illinois Gas and Electric*, 92 F Supp 118.

CONCLUSION

The ominous implications suggested by the district court in his memorandum are not ominous at all in light of the congressional policy that those selling in the market place of America cannot rig or fix prices and must openly compete without discriminating in price between purchasers. What appellee argued and the court worried over are the merits of the Robinson-Patman Act, not what the act states and precludes. Whether it is a good or a bad act is not now of concern as it is and has been the governing law on interstate sales of goods consumed in America for the past thirty years.

Granting concessions or lower or favorable prices to one favored customer or group of customers *on excuses*

such as *public good* is a device of monopolists and as old as the practices of Standard Oil Company exposed in the first great antitrust case.

Standard Oil of New Jersey v. *United States*, 221 US 1, 31 S Ct 502, 55 L ed 619.

See also:

Eastern Railroad v. *Moller Freight*, 365 US 127, 81 S Ct 523, 5 L ed 2d 464.

We urgently stress applicability of the Robinson-Patman price discrimination prohibition applies, when dealing with buyers who are competitive, to all sellers in the American market place. Most surely did Congress intend the act reach discriminatory pricing of commodities used or consumed competitively by any purchaser, state or private. It did so to avoid all inequality derived from sheer economic power, whether that power be business or government. In light of the increased governmental activity in commercial endeavor the demand for fairness in pricing remains acute, the danger of discrimination remains even more threatening to small competing businesses. We most emphatically urge this court to allow only those exemptions specifically set out by Congress and to limit the 13 c exemption, as obviously intended, to the purchases of non-competitive "supplies". To do less is to invite the indictment of future historians, perhaps in the lifetime of our own children, that in spite of plain statutory language and legislative prohibition the courts stood by in anguished uncertainty the years small business choked through increasing death strangulation in the noose of government competition—not that fair competition allowed to all other

competitors, big or small, but unfair, evil, favored and destroying price allowances literally precluding competitive survival. The plain congressional intent to assure nondiscriminatory prices to each competitor in the market place as an aid to preserve the private enterprise system should not be judicially frustrated. To do less than fully, evenly and fairly apply the federal act on pricing to each seller dealing with competitors in a given market is to curse the lot of the hangman of our great system while fitting the noose on the victim's neck the very day free enterprise was dying in America.

The Judgment below should be reversed, the Motions of Appellee denied and the appellee should be ordered to answer the amended complaint, and order should entered requiring appellee to answer each of the interrogatories and that each of the requested admissions be deemed as admitted for purposes of this action

Respectfully submitted,

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APPENDIX

Exhibits:

	Affidavits:	Record
1	Donald Kvarfordt	55-57
2	Clifford Aldredge	58
3	John Rodney Blauer	59
4	Coy Hale	60
5	Royal Reid	61-62
6	Fred Kvarfordt	63-64
A through C-4, D and E		66
B	Specifications and Bid Bond	Referring to LP File
C	Affidavit Glen R. Swenson with attachments	Pages 66 through 97
D	Affidavit Dee A. Broadbent	
E	Affidavit Evan Stevenson attached bulletin	

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Brief of Appellant by depositing three copies thereof, on the 6th day of October, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

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Racine, Huntley and Olson
Center Plaza Building
Pocatello, Idaho

L. Charles Johnson
Attorney

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